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IN THE IOWA DISTRICT COURT FOR POWESHIEK COUNTY

STATE OF IOWA, Plaintiff. v. CRISTHIAN BAHENA RIVERA, Defendant.	NO. FECR010822 STATE'S RESISTANCE TO DEFENDANT'S MOTION TO SUPPRESS

COMES NOW the State of Iowa through Poweshiek County Attorney Bart Klaver and Assistant Attorney General Scott Brown and for its resistance to the Defendant's Motion to Suppress states as follows.

I. INTRODUCTION

1. The Defendant is charged with Murder in the First Degree. His trial is set to begin September 3, 2019, in Woodbury County, Iowa, on venue change from Poweshiek County, Iowa. Judge Joel Yates is assigned by order of Chief Judge Mary Ann Brown.

2. The Defendant has filed a Motion to Suppress requesting suppression of evidence found in the Defendant's vehicle and suppression of his statements provided to law enforcement where he directly implicates himself in the death of Mollie Tibbetts and later takes them to the location where the body of Mollie Tibbetts is located.

3. Specifically, the grounds alleged by the Defendant are as follows.

a. The Defendant provided consent to search his vehicle when he was located at Yarrabee Farms where he was employed. The Defendant now claims that the consent provided to search his vehicle was invalid.

b. The Defendant claims that he was in the custody of law enforcement officers who did not read him his Miranda rights when they first contacted him on August 20, 2018. The Defendant claims that any questioning subsequent to that contact should be suppressed. It is unclear from the Defendant's motion what, if any, effect the subsequent reading of Miranda rights that were waived by the Defendant had on the interview that was conducted by the officers.

c. The Defendant claims his statement to officers as a whole was involuntary.

d. The Defendant claims that officers improperly made promises inducing involuntary admissions.

4. The State will respond to each of the Defendant's claims separately. In addition, the State will provide case law and a short analysis relating to the doctrine of inevitable discovery and the independent source doctrine.

5. The State anticipates calling several witnesses at the suppression hearing. Those witnesses will provide additional factual details in support of the State's resistance. To provide context to the State's written response to the Motion, the State provides the following brief fact synopsis.

a. Mollie Tibbetts went for a run shortly before 7:45 p.m. on July 18, 2018. Mollie left from a residence on the west side of Brooklyn, Iowa, where she was staying. Mollie was dressed in a pink sports top, running shorts, running shoes, and a headband. Mollie never returned and was reported missing to law enforcement the following evening. An investigation by local, state, and federal law enforcement ensued.

b. During the investigation, surveillance video was obtained from the residence of Logan Collins who resided at 616 East Des Moines Street in Brooklyn, Iowa. On August 15, 2018, the video was viewed by law enforcement. It was observed that the surveillance footage captured a jogger running northbound on Boundary Street southeast of the Collins residence. The jogger is believed to be Mollie Tibbetts. Other witnesses confirm that Mollie Tibbetts was jogging in Brooklyn around the same time. The direction of travel for the jogger would be consistent with a known route taken by Mollie Tibbetts. Officers also observed numerous vehicles on the video. Of particular interest was a black Chevy Malibu with distinctive features. The reason the Malibu drew officers' attention was due to the frequency it was observed in the area near the time the jogger was observed. The black Malibu was observed on multiple occasions in the surveillance video in an approximate 25-minute period after officers observed the jogger, believed to be Mollie Tibbetts, on Boundary Street.

c. On August 16, 2018, Poweshiek County Sheriff's Deputy Steve Kivi contacted the Defendant after observing the Chevy Malibu while driving near Malcomb. Kivi was aware of the observations of other officers concerning the Chevy Malibu and happened to notice a vehicle fitting the description. Kivi followed the Malibu but did not execute a vehicle stop. Rather, he waited until the driver stopped voluntarily before approaching him. When Kivi approached the driver, he identified himself and utilized the services of a neighbor to assist in interpreting for him. Kivi asked for and was provided paperwork from the driver that identified the person speaking to him as Christhian Rivera. Kivi explained to the Defendant that he was working on the Tibbetts investigation and asked him if he knew anything about her disappearance. The Defendant claimed to have no knowledge of Tibbetts's whereabouts. This factor is important to consider since not only does it identify the Defendant as being associated with the Malibu, but also provides context to the Defendant's mindset that any officer who later approached the Defendant would be of no surprise to him.

d. On August 20, 2018, the Defendant was contacted at Yarrabee Farms in Poweshiek County where he was employed. Although officers were specifically looking for the Defendant and his vehicle, he was contacted during an effort by law enforcement to conduct a canvas of the employees at Yarrabee Farms. Officers learned that the Defendant had driven a Nissan Altima to the farm for work on this date. The Altima was registered in the name of Iris Gamboa who was known as the Defendant's girlfriend. Officers also knew that the Defendant was associated with the black Chevy Malibu through his previous contact with Deputy Steve Kivi. The Malibu was located on the farm property even though it was not present at the Defendant's work site on August 20, 2018. While officers were present, the Defendant consented to a search of the Chevy Malibu and the Nissan Altima. Verbal and written consent for both vehicles was obtained in Spanish as attested to by a federal agent who speaks Spanish.

e. The Defendant was asked to come to the sheriff's office by officers and responded that he had "no problem" accompanying them to the Poweshiek County Sheriff's Office. He was also informed by an officer at the farm that "they will bring

you back over here" indicating that officers would be available and willing to bring him back to the farm at the conclusion of the interview. The Defendant was transported to the Sherriff's Office by DCI Agent Scott Green. The Defendant was in the front seat of the vehicle and was not cuffed or restrained in any way. The only conversation that occurred on the way to the Sheriff's office was small talk about the weather. The Defendant and Agent Green arrived at the Sheriff's Office at approximately 3:35 p.m.

f. Once at the Sheriff's Office, the Defendant was directed to the public lobby. The Defendant was not treated by law enforcement as if he were in custody and his cell phone was not taken away from him. Agent Green remained in the lobby for a short amount of time before departing to go back to Yarrabee Farms. While in the lobby Special Agent Trent Vileta introduced himself to the Defendant while Green was present. There was no conversation between Green, Vileta, or other officers, and the Defendant. Otherwise the Defendant remained in the lobby alone, unguarded and unsupervised by law enforcement, for over an hour prior to the beginning of the interview. At all times while he was in the lobby of the Sheriff's Office the Defendant had access to his cell phone and to the public exit from the lobby.

g. The Defendant was interviewed off and on for the next several hours. The interview process began at approximately 5:05 p.m. on August 20, 2018, and concluded at 4:15 a.m. on August 21, 2018, the next morning. A total of 10 breaks were taken of varying lengths. The longest single break was approximately 30 minutes in length where the Defendant was given a meal and consumes it unhindered and uninterrupted by any officer. The longest single stretch of continuous interview is approximately 1 hour 20 minutes which occurs in the first two hours of the interview process. There is a total of approximately 8 hours 30 minutes of actual interview out of an approximate total of 11 hours and 10 minutes the Defendant was in the presence of officers in an interview room at the Sheriff's Office. The Defendant was provided access to food, drink, and restrooms throughout the interview process. There were also numerous occasions when the Defendant turned down food and water. Up until the time he was read Miranda warnings, Defendant had access to and used his cell phone.

h. Miranda warnings were not read at the beginning of the interview process. Warnings were not provided because the Defendant was not in custody. Officers made it clear to the Defendant that he was not in custody and that he was free to leave at any time. It was made clear to the Defendant that the door to the interview room was unlocked, he was told what door led to the street, that he had ready access to the outside of the Sheriff's Office if he wished and was told that at any moment he wished he could get up and that he was free to go.

i. Miranda warnings were read to the Defendant at approximately 11:30 p.m. by Officer Romero. The rights were read in Spanish. Just prior to the Miranda warning being read federal agent Mike Fischels spoke to the Defendant on the phone asking him questions concerning his immigration status. During the interview it was determined that the Defendant was suspected of being in the United States illegally and a detainer was placed on him. At this time the Defendant was not free to leave so his Miranda rights were read to him in Spanish. Subsequently, the Defendant waived his Miranda rights and agreed to continue speaking with the officers.

j. During the interview, both before and after Miranda warnings were read, the Defendant made several admissions concerning his involvement in the disappearance and death of Mollie Tibbetts. Following the interview, the Defendant led law enforcement to the location of Mollie Tibbetts's body.

k. The DCI lab performed DNA analysis on suspected blood found in the trunk of the Defendant's vehicle, the Chevy Malibu. This is the same vehicle the Defendant consented to allowing law enforcement to search while he was at Yarrabee Farms when he first encountered law enforcement. The results of the analysis confirmed the presence of blood in the trunk of the Defendant's vehicle and DNA developed from that blood was matched to the known DNA of Mollie Tibbetts.

6. When law enforcement interacted with the Defendant both at the farm and at the Sheriff's Office, there is no significant language barrier. One of the officers who interacted with the Defendant at the farm spoke Spanish and interpreted for the other officers. At the Sheriff's Office, Iowa City Police Officers Pamela Romero and Jeff Fink both interviewed the Defendant in Spanish. Officer Romero is the lead interviewer.

Officer Romero's first language is Spanish, and she is a fluent speaker. The interpretation both at the farm and at the Sheriff's Office is clear and understandable on the recording. The translation flows smoothly. The Defendant does not appear to have any comprehension issues, there are no instances in the interview where he indicates he does not understand questions, and he appears cognitively normal.

7. The Defendant has been housed at the Poweshiek County Jail since his arrest on August 21, 2018. During his stay at the jail, there have been numerous opportunities for jail staff to observe and interact with the Defendant. On those occasions, jail staff have reported that the Defendant communicates effectively in both English and Spanish. When having conversations with the Defendant in English, he appears to clearly understand the conversation and is able to appropriately participate and communicate with jail staff who do not speak Spanish. Defendant also told Romero he has been working in the United States for four years, most of which he was gainfully employed by English-speaking business owners.

8. The State will provide a copy of the transcribed interview to the Court by email prior to the hearing. The transcript is lengthy and will take significant time to review. The defense has provided a copy of their own transcription of the interview which may, without objection from the State, be provided to the Court if the Defendant believes that is necessary.

II. VALID CONSENT TO SEARCH THE DEFENDANT'S VEHICLE WAS OBTAINED. ANY EVIDENCE FOUND AS A RESULT OF THE CONSENT SEARCH MUST NOT BE SUPPRESSED

1. On August 20, 2018, officers obtained valid consent to search a black Chevrolet Malibu which was a vehicle that was used by the Defendant. The vehicle fit the description of a vehicle observed in a surveillance video that also showed a jogger believed to be Mollie Tibbetts on her run. When the vehicle was searched, blood was located in the trunk of the vehicle. DNA analysis confirmed that the blood was that of Mollie Tibbetts.

2. In analyzing a consent search, Iowa courts employ a two-step approach to determine whether there has been a violation of the Fourth Amendment or Article I,

Section 8 of the Iowa Constitution. *State v. Lowe*, 812 N.W.2d 554, 567 (Iowa 2012); see also *State v. Naujoks*, 637 N.W.2d at 106; *State v. Halliburton*, 539 N.W.2d 339, 342 (Iowa 1995); *State v. Eis*, 348 N.W.2d 224, 226 (Iowa 1984).

a. To satisfy the first step, an individual challenging the legality of a search has the burden of showing a legitimate expectation of privacy in the area searched. *Lowe* at 567. The State concedes that Rivera had a legitimate expectation of privacy in the vehicle.

b. Step two of the analysis requires the Court to decide whether the State unreasonably invaded the protected interest. *Lowe* at 568; see also *Naujoks*, 637 N.W.2d at 106. "Warrantless searches are per se unreasonable if they do not fall within one of the well-recognized exceptions to the warrant requirement." *Naujoks*, 637 N.W.2d at 107. Consent searches are one of these exceptions. *Id.*

c. To be valid, consent must be voluntary. See *State v. Reinier*, 628 N.W.2d 460 (Iowa 2001). Consent is considered to be voluntary when it is given without duress or coercion, either express or implied. See *Schneckloth*, 412 U.S. at 225-26, 93 S.Ct. at 2047, 36 L.Ed.2d at 862. This test balances the competing interests of legitimate and effective police practices against our society's deep fundamental belief that the criminal law cannot be used unfairly. See *Id.* at 224-25, 93 S.Ct. at 2046-47, 36 L.Ed.2d at 861. Thus, the concept of voluntariness which emerges as the test for consent represents a fair accommodation of these interests and values. See *Id.* In the end, the inquiry becomes a question of fact based upon the totality of the relevant circumstances. See *Id.* at 226, 93 S.Ct. at 2047, 36 L.Ed.2d at 862.

d. A number of [non-exclusive] factors have been developed to help determine the validity of the consent given. *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). These factors consider both the circumstances surrounding the consent given and the characteristics of the defendant. *Id.* None of the factors, however, are individually controlling in most instances, but must be considered in combination with all of the circumstances. These factors include knowledge by the defendant of the right to refuse to consent. *Reiner* at 465. Another factor is whether police asserted any claim of authority to search prior to obtaining consent. *State v.*

Hatter, 342 N.W.2d 851, 854 (Iowa 1983). The show of force or other types of coercive action by police are additional factors to consider. See *State v. Holland*, 389 N.W.2d 375, 381 (Iowa 1986). The use of deception by police without a justifiable and reasonable basis is also considered. *State v. Ahart*, 324 N.W.2d 317, 319 (Iowa 1982). Furthermore, a threat by police to obtain a search warrant and forcibly execute it is a factor to consider when the police lack a sufficient basis to obtain a warrant. *State v. Owens*, 418 N.W.2d 340, 343-44 (Iowa 1988). The existence of illegal police action just prior to the time the consent is given is also an important factor. See *State v. Howard*, 509 N.W.2d 764, 767-68 (Iowa 1993)

e. The State is required to establish the consent was voluntary by a preponderance of the evidence. *State v. Garcia*, 461 N.W.2d 460, 462 (Iowa 1990).

3. In applying the factors to this case, the Court will find that when officers approached the Defendant at Yarrabee Farms, he was working in a familiar environment around people with whom he was familiar. During all interactions with the Defendant, the conversation is translated by a federal agent who speaks Spanish. The officers who approached him identified themselves, were calm, non-aggressive, and did not display any signs or indication of force or authority other than they were associated with law enforcement. The conversation between the officers and the Defendant is pleasant and he gives the outward appearance of being cooperative. The Defendant does not show any signs of distress and gives no indication that he is fearful or has any wish not to speak to the officers. The officers never assert any claim of authority to be able to obtain a search warrant for his vehicle or claim any authority to search the vehicle regardless of whether the Defendant provides consent. It is true that officers did not inform Rivera that he had the right to refuse consent to search; however, that is one factor of many. There is no other show of force or authority, and there are not any acts or conduct engaged in by law enforcement that could be described as remotely deceptive. There is no evidence that police were deceptive. If anything, officers were very forthright with the Defendant.

4. Under a totality of the circumstances analysis, the Defendant voluntarily consented to the search of both of his vehicles. Consent is confirmed by other law

enforcement officers later. At no time does he retract his consent to search the vehicle or give any indication that he wishes to or is even considering revoking his consent.

III. THE READING OF MIRANDA RIGHTS WAS NOT REQUIRED AT THE BEGINNING OF RIVERA'S INTERVIEW AT THE SHERIFF'S OFFICE. WHEN THE INTERVIEW BECAME CUSTODIAL, A PROPER NOTIFICATION OF MIRANDA RIGHTS WERE PROVIDED, AND THE DEFENDANT SUBSEQUENTLY KNOWINGLY AND INTELLIGENTLY WAIVED THOSE RIGHTS

1. The Court must utilize a dual test in determining the admissibility of a defendant's inculpatory statements over a fifth amendment challenge. *State v. Davis*, 446 N.W.2d 785, 788 (Iowa 1989). The Court must first determine whether Miranda warnings were required and, if so, whether they were properly given. *Id.* Second, the Court must ascertain whether the statement is voluntary and satisfies due process. *Id. (The voluntariness of the Defendant's statement will be discussed later in this Resistance).* Miranda warnings are not required unless there is both custody and interrogation. *Berkemer v. McCarty*, 468 U.S. 420, 429, 104 S.Ct. 3138, 3144, 82 L.Ed.2d 317, 328 (1984); *Davis*, 446 N.W.2d at 788.

2. The question becomes whether the Defendant was in the custody of law enforcement officers at the time of the interview. The custody determination depends on the objective circumstances of the interrogation, not on subjective views harbored either by the officer or the person being questioned. *Stansbury v. California*, 511 U.S. 318, 323, 114 S.Ct. 1526, 1529, 128 L.Ed.2d 293, 298 (1994). In determining whether an individual is in custody, a Court must examine all of the circumstances surrounding the interrogation. *Id.* The Court must utilize the objective test in *State v. Scott*, 518 N.W.2d 347, 350 (Iowa 1994) in that the ultimate inquiry is simply whether there was a formal arrest or restraint on the freedom of movement of the degree associated with a formal arrest. *Id.* In *State v. Deases*, 518 N.W.2d 784, 789 (Iowa 1994), the Iowa Supreme Court stated that the appropriate test was "whether a reasonable person in the defendant's position would understand himself to be in custody." The Supreme Court has adopted a four-factor test as guidance in making such a determination. *Id.* These factors include: (1) the language used to summon the individual; (2) the

purpose, place, and manner of interrogation; (3) the extent to which the defendant is confronted with evidence of her guilt; and (4) whether the defendant is free to leave the place of questioning. *Deases*, 518 N.W.2d at 789. The Defendant could have called someone who was available to give him a ride. One of the most recent analyses of whether a suspect interviewed by police is in custody comes in *State v. Tyler*, 867 N.W.2d 136, 172–74 (Iowa 2015), where the Supreme Court held that a police interview (conducted similarly to this one) was not custodial.

3. In support of a finding of custody, the Defendant points out in his motion that he was a suspect and was the focus of suspicion. Whether or not the Defendant was believed to be a suspect or the focus of suspicion is not a factor in making an objective determination concerning custody. Of all the laundry list of factors to consider, whether the Defendant was a suspect is not mentioned in case law or approved as a factor.

4. Applying the factors to this case, Rivera was not objectively in custody, based upon the totality of circumstances, until he was read Miranda warnings later in the interview.

a. The language used to summon the Defendant. The manner in which Defendant was summoned to the Sheriff's Office was not forceful or authoritative. The Defendant willingly chose to accompany a single officer to the Sheriff's Office. The Defendant did not have the means to transport himself to the Sheriff's Office since he had just voluntarily consented to a search of his vehicles. When asked to come to the Sheriff's Office, the Defendant stated, "No problem," and rode to the Sheriff's Office in the front seat with one police officer. The Defendant was also informed that "they will bring you back over here" indicating that officers would also provide a ride back to the farm at the conclusion of any contact with law enforcement. The Defendant was also asked whether or not there was any medicine that he needed to bring with him so that he had everything he needed to be completely comfortable. The Court must also factor in that the Defendant had previously encountered law enforcement concerning Mollie Tibbetts's disappearance, so the police contacting him a second time would not have surprised him or been unexpected. These facts are less

suggestive of custody than in *State v. Tyler,* 867 N.W.2d 136 (Iowa 2015), where the DCI asked Hillary Tyler if she was "okay" with DCI agents driving her to the police station for an interview. *Tyler*, 867 N.W.2d at 172. For the reasons expressed in *Tyler*, both Hillary Tyler and this Defendant "voluntary accompanied [the police] to the police station" and were not in custody. *Tyler*, 867 N.W.2d at 172.

b. The purpose, place, and manner of the interview. The Defendant was allowed to remain unguarded and unrestrained in a publicly accessible portion of the Sheriff's Office for over an hour prior to the interview beginning. The reason for the one hour plus time period was that law enforcement was waiting on officers who were fluent in Spanish to come to the Sheriff's Office to conduct the interview. During this time, the Defendant was allowed to retain his cell phone giving him access to any person he wished to contact. At approximately 5:00 p.m. the Defendant was shown to an interview room and was greeted by Officers Romero and Fink who were specifically chosen to interview him due to Rivera being a first-language Spanish speaker. The officers told him that he could leave at any time and that the door was unlocked. Officers recognized this as a non-custodial situation and gave the appropriate advisement. Multiple breaks were taken during the interview, allowing the Defendant to use the restroom, rest, and eat if he wished to do so. During all of the breaks prior to Miranda, the Defendant was allowed to retain his cell phone. On some of the breaks he is observed using his cell phone without restriction by law enforcement. Much like the interview in *Tyler*, the police here were non-confrontational and did not conduct the interview in a coercive manner. As in *Tyler*, "[t]his factor weighs against custody." *Tyler*, 867 N.W.2d at 173.

c. Whether the Defendant was confronted with evidence of guilt. The Defendant was not confronted with specific evidence of guilt during the interview because, at that time, police had little evidence of guilt with which to confront Rivera. The Defendant was questioned because he drove a car that was similar to one seen on the video at the approximate time the jogger believed to be Mollie was observed. After initially denying he had seen Tibbetts, the Defendant then admits he saw her running at the point last seen, that he turned around to see her again, and that he thought she

was "hot." Once the Defendant identifies himself as being present at the point last seen and indicates he was attracted to Tibbetts, officers reference certain potential evidence that could be found in the future investigation, but still did not confront the Defendant with specific evidence of guilt. For instance, the forensics that found Mollie's DNA in the trunk of the Malibu would not be completed for several months. The only occasions when officers raised any specific evidence was related to hair that may have been in the Malibu; however, it is never specifically presented to the Defendant that Mollie's hair had been found. On another occasion, the Defendant is told that the vehicle – and by extension he – was seen in the area where Mollie would have been jogging. This is strikingly similar to the Hillary Tyler investigation, where the DCI investigation was in an early state and the evidence that would eventually inculpate the defendant was not yet available. See *Tyler*, 867 N.W.2d at 173–74. Moreover, as the transcript indicates, a substantial part of the interview is devoted to questions that have nothing to do with Tibbetts's disappearance or death. This factor weighs against custody.

d. Whether the Defendant was free to leave. The interview room was unlocked and led into a public entrance of the Sheriff's Office. The Defendant was free to leave at any time. Officers informed the Defendant of this fact, in Spanish, at the very beginning of the interview. The Defendant also had his cell phone and was able to contact anyone he wished throughout the interview. The Defendant freely chose to interview with officers and remain in the interview room from approximately 5:30 p.m. until the Miranda warning was read to him.

Later in the interview the Defendant is asked by Romero whether or not they will find any evidence in his residence or vehicle. The Defendant responds by stating that he does not have anything to hide.... and that if he would've wanted to, he would've left right away when he was told that the door was opened. This statement by the Defendant clearly indicates that he understands that he is free to leave and is not in custody.

At approximately 11:30 p.m., a federal immigration agent interviewed the Defendant by phone concerning whether he was in the country illegally. Following the interview, the Defendant was advised that a detainer would be placed on him. The

decision to place the Defendant in custody was made by ICE, without consulting Officer Romero, who was interviewing the Defendant. Once this decision was made, and the objective circumstances concerning the custody of the Defendant were changed by ICE and relayed to Officer Romero, she read the Defendant his Miranda rights as it was clear at that time that the Defendant was no longer free to leave. At this time, the Defendant was advised he was being detained and his cell phone was taken from him.

As a further analogy, Hillary Tyler was told that, "although she had ridden with [the officer] to the police station, she was free to leave at any time and that he would give her a ride back [home] if she desired." *Tyler*, 867 N.W.2d at 174. The statements to the Defendant here were comparable to those in *Tyler* and, like *Tyler*, the Defendant was not in custody until he was *Mirandized*.

4. A Miranda warning was validly given in Spanish through Romero and the Defendant provided a valid waiver of those rights.

5. After Miranda warnings were provided, the Defendant provided numerous admissions that he was involved in Mollie Tibbetts's disappearance and death. After Miranda warnings were provided, the Defendant continued to speak with officers for nearly another five hours with breaks and never requested an attorney or stated he did not want to speak with officers anymore.

6. After Miranda warnings were read, the Defendant led the officers to the body of Mollie Tibbetts following the interview. During the transportation, the Defendant had no difficulty finding the location of her body.

7. No Miranda violation occurred. All of the statements made by the Defendant to law enforcement are not suppressible.

IV. THE DEFENDANT'S STATEMENTS TO LAW ENFORCEMENT WERE VOLUNTARY. NO LENIENCY WAS INDICATED BY THE OFFICERS CONDUCTING THE INTERVIEW.

A. ALLEGATIONS OF INVOLUNTRAY STATEMENTS

1. The Defendant makes the claim that his statements to law enforcement should be found to be involuntary based on the conduct of the officers both before and

during the questioning of the Defendant, the Defendant's age and education, the so-called language barrier, and the length of the questioning.

2. The State carries the burden of proof, by a preponderance of the evidence, to demonstrate the Defendant's statements were voluntarily. *State v. Hodges*, 326 N.W.2d 345, 347 (Iowa 1982). The test for voluntariness is whether the "totality of circumstances demonstrates that the statement was the product of an essentially free and unconstrained choice, made by the defendant at a time when his will was not overborne nor his capacity for self-determination critically impaired." *State v. Vincik*, 398 N.W.2d 788, 790 (Iowa 1987). Coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' "under the Fourteenth Amendment." *Id.* (quoting *Colorado v. Connelly*, 479 U.S. 157, 167 (1986)); see also *State v. Hibdon*, 505 N.W.2d 502, 505 (Iowa Ct.App.1993).

3. Other factors in determining voluntariness include:

> The defendant's knowledge and waiver of his Miranda rights, the defendant's age, experience, prior record, level of education and intelligence, the length of time defendant is detained and interrogated, whether physical punishment was used, including the deprivation of food or sleep, defendant's ability to understand the questions, the defendant's physical and emotional condition and his reaction to the interrogation, whether any deceit or improper promises were used in gaining the admissions, and any mental weakness the defendant may possess.

Vincik, 398 N.W.2d at 790 (citation omitted); see also *State v. Whitsel*, 339 N.W.2d 149, 153 (Iowa 1983).

4. In this case, the Defendant was 24 years of age at the time of the interview. The Defendant had some formal education and was able to successfully maintain employment in the United States for four years, working for English-speaking employers. The Defendant was married and divorced, parented a 3-year-old child, and had a current girlfriend. The length of time of the interview was slightly over 11 hours; however, 10 breaks were taken, and the Defendant was allowed food, water, and access to a restroom. Although a Miranda warning was not read at the beginning of the interview, it was read and waived later in the interview.

5. There was no physical punishment used on the Defendant and he was not deprived of water or food. In fact, a lengthy break was taken approximately 4½ hours into the interview to provide the Defendant with a meal. He was given approximately 30 minutes to complete the meal without any interruption from law enforcement. The Defendant did indicate he was sleepy during the interview; however, he never indicated he was so tired that he could not continue. The Defendant was also allowed to keep his phone until the portion of the interview where Miranda was read.

6. There is no language barrier between Romero, Fink, or any other officer. Romero is fluent in Spanish and Fink is a competent Spanish speaker. The only questions that had to go through any interpretation were those propounded by Agents Vileta and Pottratz. Romero provided the interpretation. At all times during questioning the Defendant appears to understand the questions and is able to appropriately respond to them.

7. The Defendant appears physically fit and has no known mental defects or disorders. No physical or mental ailments present themselves at any time during the questioning. His mood and affect appear normal during his interactions with Romero, Fink, and other officers.

8. At no time during the interview do the officers make any improper promises or use any type of deceit. The Defendant claims in paragraph 35 of their motion to suppress that they inaccurately inform the Defendant that they have found Mollie's hair in his car. What the officers do inform the Defendant is that they found hair in his car and ask him who it belongs to. At no time is any deceit used to gain admissions or the cooperation of the Defendant.

9. Concerning the statement made by an officer that the Defendant did not need an attorney, some context is important to understand what occurred. When officers first contacted the Defendant on August 20, 2018, before he was interviewed, he was at his place of employment. Officers made inquiry with the Defendant's supervisor as to whether or not the Defendant was able to travel to the Sheriff's Office to be interviewed. The supervisor informed the officers that he was going to contact Attorney Mike Mahaffy. The supervisor indicates that Mahaffy is the farm's attorney and

indicates to the officers that he will meet the Defendant at the Sheriff's Office. When the supervisor indicates he is going to call the farm's attorney, the officer informs the Defendant that the supervisor will be calling the attorney for the farm and for him as well but that he does not need it. Mike Mahaffy nor any other legal counsel met officers or the Defendant at the Sheriff's Office.

a. This factor is only one of many in determining voluntariness. The foregoing factors far outweigh whatever impact this statement may have on the analysis. But even if the statement by police is a dominating factor in the voluntariness analysis, the case law requires this Court to reject the Defendant's argument. In *Parsons v. Brewer,* 202 N.W.2d 49 (Iowa 1972), the Iowa Supreme Court considered whether the following statement by a deputy warden rendered a confession involuntary: "You don't need a lawyer. I want to know what happened. That's the only way I can help you." *Id. at 51*. The Court unanimously held that the statement did not render the confession involuntary, even in light of the presence of armed guards when the confession was made. *Id.* at 52–53. With *Parsons* as a backdrop, the Defendant's confession cannot be suppressed, as the facts here are even less suggestive of voluntariness. The statement was singular, and it is clear that the officer is doing nothing to obstruct the Defendant's choice concerning whether or not he wants to have a lawyer present with him. The statement by the officer is true in the sense that the Defendant does not need an attorney. He is not in custody, and Miranda warnings are not required at the point the officer makes the statement. If the officer were truly trying to prevent the Defendant from making any decision concerning an attorney, he would not interpret any of the statements made by the farm supervisor. Instead, he interprets the statements for the Defendant and makes it clear that the farm supervisor will be contacting the farm's attorney and the supervisor is planning to let him know where the Defendant will be going and with whom. Further, as stated in other portions of this resistance concerning voluntariness factors, the Defendant was treated well by law enforcement – he was given restroom breaks, he was free to leave the interview up until the point he was read Miranda, and he had access to his phone with which he could contact outsiders.

b. Even if the supervisor meant the attorney for the Defendant, and specifically said he was going to get an attorney for the Defendant, the Defendant has to request an attorney himself, which he never did. Even if the supervisor stated that he was getting the Defendant an attorney, it is irrelevant. The Defendant has to make the request himself. See *Moran v. Burbine*, 475 U.S. 412, 106 S. Ct. 1135, 89 L. Ed. 2d 410, (1986).

10. The role of Romero and Fink as interpreters was to relay information to investigators. This role was communicated to the Defendant. He was told on numerous occasions that they were not the decision makers in the case. The Defendant asks Romero late in the interview, "What is going to happen to me?" Romero replies, "I don't know what is going to happen to you." This is a clear example of communicating to the Defendant that they can make him no promises and do not have the authority to make a charging decision.

11. Applying a totality of circumstances analysis to the interview of the Defendant, his statements are voluntary and uncoerced.

B. ALLEGATION OF PROMISSORY LENIENCY

1. The Defendant is making a claim that his statements should be found to be involuntary based on promises of leniency made by the officers interviewing him.

2. The Court must review challenges to confessions [or admissions] based on a promise of leniency under a common law evidentiary test. *State v. Polk*, 812 N.W.2d 670, 674 (Iowa 2012); *State v. McCoy*, 692 N.W.2d at 27–28. The Defendant's confession is to be suppressed if it follows the officer's improper promise of leniency. *Id.*

3. An officer can tell a defendant that it is better to tell the truth without crossing the line between admissible and inadmissible statements from the defendant. *McCoy* at 28. Our cases, however, prohibit the investigator from communicating to defendants that an advantage is to be gained by making a confession. See, e.g., *Id.* (The line between admissibility and exclusion seems to be crossed " 'if the officer ... tells the suspect what advantage is to be gained or is likely from making a confession.' " (citation omitted)).

4. In *State v. Whitsel*, 339 N.W.2d 149, 153 (Iowa 1983) the Iowa Supreme Court held the defendant's confession was admissible when the officers stopped short of indicating his cooperation would likely result in less severe punishment. We summarized the facts as follows:

> During the course of questioning, Whitsel volunteered information concerning his prior arrest on a sexual abuse charge.... In response to this statement offered by Whitsel, the detectives told Whitsel that they would recommend to the county attorney that Whitsel receive psychiatric help and tell the county attorney of his cooperation. They emphasized, however, that they could not make any promises or give any guarantees and would only relate to the county attorney what had been said. Whitsel then made his confession following this exchange. *Id.*

5. An offer to inform the county attorney of the Defendant's cooperation, without any further assurances, is not improper. *Id.*

6. By contrast, the Iowa Supreme Court has held officers impermissibly engage in promissory leniency when they make "suggestion[s] ... defendant would receive better treatment and less severe punishment" if he confesses. *State v. Hodges*, 326 N.W.2d 345, 346 (Iowa 1982). In *Hodges*, the officer told the defendant "there was a much better chance of him receiving a lesser offense than first degree murder" if he talked. *Id.* at 349. In *State v. Kase*, we held an investigator crossed the line by telling defendant "that if she told him what she knew about Vaughn's death and signed a consent to search her apartment no criminal charges would be filed against her; otherwise, she was told, she would be charged with murder." 344 N.W.2d 223, 226 (Iowa 1984). In *State v. Quintero*, 480 N.W.2d 50, 50–51 (Iowa 1992) the Supreme Court held the police utilized improper threats by suggesting to defendant that if he did not tell the truth "he would anger the judge and jury and suffer greater punishment.". In *McCoy*, we found the officer improperly promised leniency by telling the defendant 25 times that "if he didn't pull the trigger he would not be in any trouble." 692 N.W.2d at 28. In *State v. Polk*, the Iowa Supreme Court concluded an officer crossed the line by combining statements that county attorneys "are much more likely to work with an individual that is cooperating" with suggestions that the defendant would not see his kids "for a long time" unless he confessed. *Id.* at 676.

7. Of importance to consider before making any determination on the voluntariness of the Defendant's statements is the fact that the Defendant led police to the body of Mollie Tibbetts and Tibbetts's DNA was found in the trunk of the Defendant's vehicle. The main policy concerns of Courts regarding police coercion and promissory leniency is that both, if engaged in by law enforcement, potentially lead to false confessions. In this case, it is demonstrably clear, independent of the conduct of law enforcement, that the Defendant is responsible for the disappearance and death of Mollie Tibbetts. Assuming for arguments sake that law enforcement coerced every single statement out of the Defendant, regardless of the amount of coercion, they had no way of making the Defendant know where Mollie Tibbetts's body was located or of making her DNA be present in Defendant's vehicle. The Defendant provided indisputable corroborative information, that police did not know, that proved his statement was reliable.

8. The defense has raised several claims of promissory leniency. In each of the instances with the exception of one, the officers implore the Defendant to help himself, help officers, that they want to help the Defendant and that they hope to help the Defendant. The defense argues that any use of the word "help" by law enforcement is automatically connected to a promise of leniency, regardless of context. When Officer Romero asks the Defendant to help her understand, or help her relay his narrative to investigators, or help her get to the bottom of this, there is absolutely no consequence, either positive or negative, attached to the use of the word help.

9. In addition to generalized statements about help is the statement by Romero where she brings up the subject of the Defendant's daughter and asks the Defendant to think about his daughter. What is absent from any of the statements is any consequence tied to whatever assistance is being offered by the officers. In other words, they never indicate to the Defendant that if he helps them, charges will be avoided or reduced or that his sentence will be anything less. They never suggest by not helping the officers that he will suffer some greater punishment or consequence for not providing them information. Although officers brought up the Defendant's young child, they never threatened that he would never see her again or tied any consequence

to anything related to his child or family. In fact, the Defendant was told just the opposite concerning cooperating with law enforcement. Agent Vileta informed the Defendant that he can talk to the people that make decisions and let them know he cooperated; however, he cannot make any promises.

10. Late in the interview, Romero suggests to the Defendant that he did not act out of malice, that when a person acts in a certain way it could be considered premediated as opposed to a person that has made a mistake. That is directly followed by questions from Rivera asking what is going to happen to him. He is then told that if he is truthful he will be viewed as a person who did wrong, who made a mistake, and is facing the facts because he is a man and will not be presented as a coward who does not tell the truth. The Defendant is told that he is not a coward. As with the earlier statements, the Defendant is encouraged to tell the truth. He is never told that he can avoid any consequences for telling the truth – only that it is the most honorable thing to do under the circumstances. Based on comments by Romero and Vileta, the Defendant only knows that they are not the persons who know what is going to happen to him and can make him no promises.

V. INEVITABLE DISCOVERY

1. If the Court should conclude that conduct by law enforcement in some way impacts the State's ability to produce evidence at trial concerning the location of Mollie Tibbetts's body or the subsequent autopsy results, the State would request the Court engage in analysis concerning the inevitable discovery of the body of Mollie Tibbetts.

2. "Exclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial." *Nix v. Williams*, 467 U.S. 431, 446 (1984). For this reason, even if the statements made by the Defendant were involuntary, the physical evidence is admissible where the State can prove "the evidence in question would inevitably have been discovered without reference to the police error or misconduct." *Id.* at 448.

3. *Nix* is the cornerstone case. There, the Iowa Bureau of Investigation had recovered a body due to an illegally obtained confession, but the State maintained the

body would have been inevitably discovered because it was found in the path of a volunteer search party working a grid at the direction of Iowa police. See *Nix*, 467 U.S. at 448–50. Three courts, including the United States Supreme Court and the Iowa Supreme Court, agreed with the State and concluded that the search parties would have inevitably discovered the body—even though it was initially discovered due to a tainted confession. See *Id.* at 449–50; *State v. Williams*, 285 N.W.2d 248, 258 (Iowa 1979) (adopting the inevitable-discovery rule before the United States Supreme Court). The State does not need to prove inevitable discovery beyond a reasonable doubt. See *Williams*, 467 U.S. at 444 n.5. Instead, the State's burden is by a preponderance of evidence—to prove the evidence probably would have been discovered without the allegedly tainted statements. See *Id.*

4. The independent-source doctrine recognizes a principle dating back to *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920): "If the evidence in question was obtained from a source independent of the primary illegality, it is not subject to exclusion as tainted fruit." *State v. Hamilton*, 335 N.W.2d 154, 158 (Iowa 1983) (citing *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920)); accord *Murray v. United States*, 487 U.S. 533, 539, (1988). The Iowa Supreme Court has recognized that, while the State bears the overall burden of persuasion, the defendant "must, in the first instance, go forward with specific evidence of a nexus between the illegality and the evidence, in order to raise the issue." *Hamilton*, 335 N.W.2d 158 (also collecting cases).

5. Applying these factors to the present case, Mollie Tibbetts's body was located in an open farm field. Although at the time the field was covered in July corn, that would not always be the case. Once the corn was harvested from the field, the remains of Mollie Tibbetts and her clothing would have been readily visible. There would have been no other structure or obstruction keeping her remains from view.

6. Furthermore, law enforcement was continuing to search for Mollie Tibbetts. It was only a matter of time before law enforcement would have searched the field and been able to readily find the body of Mollie Tibbetts

WHEREFORE, the State of Iowa requests the Court enter an order denying the Defendant's Motion to Suppress.

Respectfully Submitted,

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